

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
:
vs. :
:
DAVID TOOMER GARVIN : NO. 06-514-01

PHILADELPHIA, PENNSYLVANIA

MAY 18, 2012

BEFORE: THE HONORABLE STEWART DALZELL, J.

REVOCATION OF SUPERVISED RELEASE HEARING

APPEARANCES:

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(Transcript produced by machine shorthand via C.A.T.)

1 IN ATTENDANCE:

2 Derrick Luby
3 United States Probation Office
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1 (Proceedings commenced at 11 a.m.)

2 THE COURT: Good morning, everyone.

3 MR. LAPPEN: Good morning, your Honor.

4 MR. WILSON: Good morning.

5 THE COURT: We are together in United States of
6 America versus David Toomer Garvin, which is Criminal Number
7 06-514, and we are here to consider a bit of ancient history,
8 namely, a violation of supervised release petition that I
9 signed on April 27, 2011, involving the defendant.

10 And we are delighted to have with us the First
11 Assistant U.S. Attorney, Louis Lappen.

12 MR. LAPPEN: Thank you.

13 THE COURT: And we're also delighted to have another
14 old friend, since we're all a bit older than we were when this
15 started, Mark Wilson. How are you?

16 MR. WILSON: Good, your Honor.

17 THE COURT: And pinch hitting for Mr. Crawford is
18 Derrick Luby.

19 PROBATION OFFICER LUBY: Good morning, your Honor.

20 THE COURT: Good morning. And, Mr. Garvin, welcome
21 back.

22 Our first order of business, of course, is
23 the -- the reason this has been delayed, we always, where
24 there are alleged violations in the form of commission of
25 other crimes, wait to see what happens. And I take it, Mr.

1 Wilson, in the Item A, which relates to CP-51-CR-0012010-2010,
2 it's not disputed that on March 31, 2011, your client was
3 sentenced to 6 months to 12 months custody by the Honorable
4 Daniel J. Anders of the Court of Common Pleas of Philadelphia
5 County; is that correct?

6 MR. WILSON: That is correct, your Honor. It's also
7 my information that an appeal was filed from that conviction
8 that is still pending in the Superior Court of Pennsylvania.

9 THE COURT: Okay, thank you. But the conviction's
10 not disputed?

11 MR. WILSON: He was convicted, that's correct.

12 THE COURT: He was convicted.

13 And, secondly, in Item B, which I'm advised is
14 CP-51-CR-0008507-2011, my understanding is that a couple of
15 weeks ago, the defendant was sentenced to time served on that.

16 MR. WILSON: I believe he was given a probation
17 sentence, your Honor.

18 THE COURT: A probation?

19 MR. LAPPEN: Yes, that's my understanding.

20 THE COURT: Does the Government have that?

21 MR. LAPPEN: Yes, we do, your Honor. My
22 understanding is he was sentenced to 3 years probation.

23 THE COURT: 3 years probation?

24 MR. LAPPEN: Yes.

25 THE COURT: Okay --

1 MR. WILSON: Yes.

2 THE COURT: -- on this offense which was aggravated
3 assault, possessing an instrument of crime, terroristic
4 threats, simple assault and reckless endangerment? Is that
5 what he was sentenced on?

6 MR. LAPPEN: Yes, that's correct, your Honor.

7 THE COURT: Those offenses?

8 MR. LAPPEN: Right. He received 2 years probation
9 on the simple assault and then 1 year of probation on the
10 recklessly endangering another person. And that was
11 consecutive term --

12 THE COURT: What was the date of that sentence?

13 MR. LAPPEN: April 24th, 2012.

14 THE COURT: Okay. April 24, 2012. Thank you, Mr.
15 Lappen.

16 I take it that's not contested either?

17 MR. WILSON: No, your Honor.

18 THE COURT: Is that on appeal?

19 MR. WILSON: No, your Honor.

20 THE COURT: Okay. And with respect to Items C and
21 D, obviously, they're far less consequential. Are they
22 disputed?

23 MR. WILSON: Your Honor, C, he did not appear on
24 those particular dates, although he indicates that he was
25 unable to appear on those dates. He didn't always have a cell

1 phone. The way that RUT program works is you get a voice mail
2 in the morning or a call in the morning from the computer
3 telling you -- or you're supposed to call in to a voice
4 program that tells you what your color is, and then if it's
5 your color, you're supposed to come in that day within the
6 next 24 hours for a urine. There were times at that time that
7 he didn't have access to a phone.

8 THE COURT: Okay.

9 MR. WILSON: With respect to D, your Honor --

10 THE COURT: Yes.

11 MR. WILSON: I have his prescription for Dronabinol,
12 which, if I can show --

13 THE COURT: Well, this came up because I was looking
14 at my file. I did an order on October 7, 2010, that dealt
15 with that issue, and noted certain concerns that I had, and it
16 denied Mr. Garvin's motion for modification "without
17 prejudice." And I'm quoting paragraph three thereof. Without
18 prejudice to his submission of an amended motion that
19 adequately addresses the concerns that I identified in the
20 order. And I never got anything after that.

21 MR. WILSON: I believe he was arrested shortly after
22 that, your Honor, but with respect to -- all of these
23 incidents occurred before that motion was filed, obviously.
24 And I may have attached this to the previous motion, your
25 Honor, but it was --

1 THE COURT: I think you did --

2 MR. WILSON: I have one of his prescriptions.

3 THE COURT: -- because it's alluded to.

4 MR. WILSON: He took the medication to treat nausea
5 and vomiting and it's also used to treat loss of appetite and
6 weight loss in patients that have the condition that Mr.
7 Garvin has, and, specifically, it indicates on the
8 prescription the Dronabinol, also called THC, is the man-made
9 form of the active natural substance in marijuana.

10 THE COURT: Well, I guess the point is this. We
11 have our hands sufficiently full with Items A and B; wouldn't
12 you agree?

13 MR. WILSON: Yes, your Honor.

14 THE COURT: So -- and they're not contested?

15 MR. WILSON: That's correct.

16 THE COURT: I mean, they can't be contested.

17 So let me ask my old friend, Mr. Lappen, what the
18 Government's view is about this. And I say that because,
19 obviously, they are serious matters and troubling matters,
20 particularly for a defendant to whom I gave a break at the
21 time that you were an ordinary trial attorney, because we were
22 concerned about his health situation since he was HIV positive
23 and we gave him a bit of a break even without a motion. But
24 things haven't worked out as we had all hoped. So what's the
25 Government's view of what I should do now in view of these two

1 convictions?

2 MR. LAPPEN: That is true, your Honor, and that
3 was --

4 THE COURT: Why don't you come forward to the
5 lectern.

6 MR. LAPPEN: That was my thought exactly. I mean,
7 these are the cases that you really don't want to see again,
8 because the crime that Mr. Toomer Garvin committed originally
9 was a serious fraud crime.

10 THE COURT: Absolutely. Defrauding a Crime Victims
11 Fund.

12 MR. LAPPEN: Correct.

13 THE COURT: I remember it well. I'm sure you do,
14 too.

15 MR. LAPPEN: Right. Absolutely. And I'm quite sure
16 had Mr. Toomer not been suffering from his physical maladies
17 as he was, that your Honor would have imposed a far more
18 serious sentence.

19 THE COURT: No question about it.

20 MR. LAPPEN: And I also remember well that your
21 Honor warned the defendant that he was not to commit
22 additional crimes, that he was receiving a break, and don't
23 come back. That's a clear message that's sent to a defendant
24 such as this.

25 THE COURT: So I guess here, obviously, he's in

1 violation. I guess the question that is worth discussing
2 besides the length of the punishment for that, which,
3 obviously, is going to be consecutive because he's already
4 served the time on the two state matters, is whether any
5 further supervision makes the slightest bit of sense given, A,
6 his track record, and, B, something that's happened since the
7 sentencing, which is the crunch that I know your office and
8 the Judiciary and, indeed, the Federal Defender are facing
9 given the federal budgetary constraints that affect all of us.
10 I'm just trying to be practical here.

11 MR. LAPPEN: Right. And that's always -- it's
12 always the question. It seems as if sometimes defendants come
13 in here and the more troubled they are, the more crimes
14 they're committing, they get a bizarre benefit in some sense
15 because the court system doesn't want to handle them anymore
16 and they're relieved of their obligations under a supervised
17 release term.

18 THE COURT: Right.

19 MR. LAPPEN: I know that I spoke with the probation
20 officer before the hearing and their recommendation is some
21 period of continued supervision, not the maximum period, but
22 some period, and I think that would be appropriate here to
23 make sure, as best we can, that this person is, as best we can
24 hope, set in the right direction.

25 THE COURT: But Mr. Garvin, though, is over 40. So,

1 you know, some of us who are past that, even looking back from
2 our antiquated age, that's when criminality should be dropping
3 off, but that hasn't happened here. Quite the contrary.

4 MR. LAPPEN: That's true, it has not.

5 THE COURT: So the Government's view is there should
6 be some period of supervised release?

7 MR. LAPPEN: Correct. And I know the Probation's
8 recommendation here is 20 months in prison followed by 12
9 months of supervised release.

10 THE COURT: Right. And the Guideline range -- of
11 course, even pre-Booker, the Guidelines were advisory as far
12 as probation violations were concerned. The statutory maximum
13 is 24 months, isn't it?

14 MR. LAPPEN: That's correct.

15 THE COURT: But the Guideline range, I think it
16 capped out at 23?

17 MR. LAPPEN: 15 to 21.

18 THE COURT: 15 to 21. 15 to 21.

19 Since he got such a break at the sentencing, and
20 given the seriousness of not one, but two convictions, don't
21 you think that this is a candidate for 24 months?

22 MR. LAPPEN: It certainly is, and we're not talking
23 about a large difference between 20 and 24.

24 THE COURT: No.

25 MR. LAPPEN: I know that Probation recommended 20.

1 That's at the high end of the Guideline range. Obviously, I
2 would defer to the Court as to what the appropriate sentence
3 is. It should certainly be a serious sentence of imprisonment
4 and --

5 THE COURT: It should be.

6 MR. LAPPEN: -- should send a message that this
7 can't be tolerated anymore.

8 THE COURT: And we just can't, and as you accurately
9 recall, I said it point blank at the time I imposed sentence
10 back in, what was it, '07?

11 MR. LAPPEN: That's correct.

12 THE COURT: Okay, thanks, Mr. Lappen.

13 MR. LAPPEN: Thank you.

14 THE COURT: Mr. Wilson, you were there, also, when I
15 imposed sentence, and I did say what Mr. Lappen recalled I
16 said and I gave your client a break, and I guess this is
17 further evidence, if any were needed, that no good deed goes
18 unpunished.

19 MR. WILSON: Well, your Honor, if I might, while Mr.
20 Garvin was in custody serving the last sentence, the house
21 that had been his mother's house that he was living in was in
22 dire need of repairs. I don't know if your Honor recalls, at
23 the time of sentencing, the various repairs that it needed.
24 There were pictures that were presented showing gaping holes
25 in the roof. And that house was taken by the City. So when

1 he came out from prison, he had no place to live and he's
2 basically been living at the Ridge Avenue Shelter while on
3 supervised release. The most recent conviction, the simple
4 assault conviction, that incident occurred right in front of
5 the shelter as he was returning or coming to the shelter.
6 They only opened it during the evening hours. He was coming
7 to the shelter. There was -- it seems that he was accosted by
8 another individual and he felt that he was defending himself
9 during that incident. The injuries, from what I understand,
10 were relatively nonexistent. It was a scratch that appeared
11 on -- they had a photograph of it. The complainant did not
12 appear. After the preliminary hearing, the complainant did
13 not appear for any listings after that. At the listing at
14 which Mr. Garvin eventually pled guilty, a plea deal was
15 offered to him and he decided to take it. You know, it ended
16 the process for him as far as he was concerned at that point.
17 But it was an altercation that was between two individuals who
18 were using the shelter --

19 THE COURT: It did involve a knife, though, didn't
20 it?

21 MR. WILSON: That's the allegation.

22 THE COURT: I don't have the transcript of the
23 guilty plea, but that's what Mr. --

24 MR. WILSON: I thought it was simple assault.

25 THE COURT: That's what Mr. Carmichael put into the

1 report. The arrest report said that.

2 MR. WILSON: That was the allegation --

3 THE COURT: That's the allegation.

4 MR. WILSON: -- that came not from the police. No
5 knife was recovered. It came not from the police; it came
6 from the complainant who never showed up after the preliminary
7 hearing.

8 THE COURT: But, in any event, he did plead guilty
9 to these charges.

10 MR. WILSON: To simple assault and reckless
11 endangering.

12 THE COURT: And reckless endangerment, okay.

13 MR. WILSON: I don't think there was -- there was a
14 possession of instrument crime charged initially, but I don't
15 think he pled guilty to that. So while there was an
16 allegation, initially, that he had a knife, there was no plea
17 to that.

18 THE COURT: Okay.

19 MR. WILSON: The --

20 THE COURT: But, of course, the other matter which
21 involves a solicitation from somebody who's HIV positive --

22 MR. WILSON: And I'm not going to comment on that,
23 your Honor, other than that I know he was convicted. There
24 was a trial. It is on appeal to the Superior Court.

25 MR. LAPPEN: May I interrupt one moment?

1 THE COURT: Yes, Mr. Lappen.

2 MR. LAPPEN: I don't think the appeal relates to the
3 underlying facts of the case. It's on a legal issue having to
4 do with a suppression of a statement.

5 THE COURT: I'm sorry, Mr. Lappen?

6 MR. LAPPEN: The appeal relates to the suppression
7 of a statement, not to a challenge to what the underlying fact
8 is. That is, he's not denying, as far as I know, that he did
9 what is alleged in that case. It's just a question of whether
10 his rights were violated by a statement that was taken from
11 him.

12 THE COURT: Right, but he was, indeed, convicted.
13 Was it a jury trial or nonjury trial?

14 MR. WILSON: Nonjury trial, your Honor.

15 THE COURT: In the Criminal Justice Center.

16 MR. WILSON: He did -- just, if I may --

17 THE COURT: Yes.

18 MR. WILSON: -- he did deny the allegation in the
19 charge. There is an appeal that, if he won, would
20 theoretically grant him a new trial, at which he would
21 continue to deny that he did anything to approach a police
22 officer, an undercover police officer, and solicit him.

23 THE COURT: Okay, but God knows when that's going to
24 happen.

25 MR. WILSON: That is correct.

1 MR. LAPPEN: I mean --

2 THE COURT: I'm sorry?

3 MR. LAPPEN: That is what he did.

4 THE COURT: Right.

5 MR. LAPPEN: I mean, they may have obtained the
6 evidence of that illegally, that's the argument, but that's
7 what he did. He wasn't --

8 THE COURT: But the underlying conviction --

9 MR. LAPPEN: Right.

10 THE COURT: Right. So, anyway, we're talking about
11 the sanction.

12 MR. WILSON: Yes, your Honor.

13 THE COURT: So you must admit I gave him a very
14 significant break at the time of sentencing, and I did say the
15 things that Mr. Lappen recalled, because I recall them,
16 because I don't forget this case. And once I refreshed my
17 recollection -- I mean, it was an unusual case, as frauds go,
18 to defraud the Crime Victims Fund and stage phony crimes. We
19 have plenty of real ones, that's for sure.

20 MR. WILSON: And, your Honor, that did occur quite a
21 while ago. I think in the early part of the last decade. I
22 think the Guidelines were 30 to 37 and your Honor gave him 24
23 months, if I recall correctly.

24 THE COURT: That is correct.

25 MR. WILSON: Your Honor, living at the shelter,

1 Upper Ridge Avenue, is not an easy thing, having represented
2 many an individual who's been charged with a very similar type
3 of offense outside of that shelter. In the hours between
4 about 8 to 10 o'clock at night when people are starting to
5 line up to get into the shelter at night, disputes occur
6 between people who are all residing at the shelter there for
7 various reasons, but all of them -- various reasons, all
8 involving poverty, that these disputes arise. And the police,
9 to try and keep some semblance of order, will just bring
10 people in. And they're not always the most serious of
11 incidents and sometimes people have to defend themselves in a
12 very difficult situation. What little they do acquire becomes
13 subject to theft from all different angles. And I would say
14 in Mr. Garvin's defense, it's a different society than what
15 most people in Philadelphia or the environs live in.

16 THE COURT: I'm sure Mr. Lappen would not question
17 that and I certainly don't.

18 MR. WILSON: So I would suggest to your Honor that,
19 yes, he pled guilty to simple assault and recklessly
20 endangering another person. It's not the same as if somebody
21 had been in a bar that's frequented by upper middle class
22 people and they get in a fight with each other and somebody
23 hurts somebody seriously enough to get a simple assault
24 conviction. It's somewhat, I would suggest, a different
25 thing, and I would suggest doesn't require the same type of

1 sanction. Obviously, Mr. Garvin does have a record, and I'm
2 not trying to, in any way, discount what he was convicted of
3 before your Honor in this case, but his circumstances have, if
4 anything, gotten much worse since the last time and --

5 THE COURT: Which way does that cut, though? They
6 are worse, I agree with you, and I'm sympathetic to that, but,
7 nevertheless, it has enhanced the probability of criminality
8 in both offenses that bring us together; one, desperate for
9 cash, and the other, an altercation.

10 One thing we know about prison life is that it's
11 structured. Certainly in the Bureau of Prisons, it is.

12 MR. WILSON: Certainly, though, at a cost to the
13 public.

14 THE COURT: Of course. Of course, but there are
15 other costs, as well. I mean, for example, in the first case,
16 the 2010 case, my goodness, the person is HIV positive who's
17 going to have a sexual contact with somebody. That's quite
18 serious, indeed, regardless of whatever the suppression issue
19 may have been.

20 Okay, anything else you'd like to say?

21 MR. WILSON: And, for the record, your Honor, while
22 he was found guilty by the judge at that time and the
23 statement may have had some sway over what the judge decided,
24 he has always denied that he had that encounter of any kind
25 with the undercover police officer.

1 THE COURT: Well, he was found guilty beyond a
2 reasonable doubt.

3 So, Mr. Garvin, would you like to address the Court?
4 You don't have to, but if you'd like to, this would be the
5 time to do it.

6 THE DEFENDANT: Yes.

7 THE COURT: Okay, will you come forward, please.

8 DAVID TOOMER GARVIN, DEFENDANT, SWORN.

9 THE COURT: Yes, sir, what would you like to say?

10 THE DEFENDANT: Um, that it is true that I did get
11 arrested twice, but I did appeal the first case. It is not
12 true that I approached that officer and made any kind of --
13 complied with him to do any type of sexual act. That's not
14 true. I appealed the case.

15 THE COURT: So I should just ignore the fact that
16 you were found guilty by the Common Pleas judge?

17 THE DEFENDANT: It was a waiver judge, and I was
18 told by my attorney to take the waiver judge and not take the
19 jury trial.

20 THE COURT: Okay, I can see you obviously learned
21 from that.

22 THE DEFENDANT: Yeah. I should have took the jury
23 trial and not the waiver judge.

24 THE COURT: Right. That's the lesson you took from
25 that?

1 THE DEFENDANT: Yeah.

2 THE COURT: Okay.

3 THE DEFENDANT: But there was no -- you know, I did
4 not comply with any act. And I was getting SSI, so I was not
5 cash thirsty, although I was living in the shelter. And,
6 secondly, I got into a fight and it was beyond my control. I
7 couldn't do anything else about it. You know, it was either
8 him get hurt or me get hurt. And even after fighting this
9 guy, I didn't hurt him seriously. I tried to just -- the word
10 is detain him, so he couldn't hurt me. So it wasn't no
11 serious injury to him. And I didn't -- I did not plead guilty
12 to aggravated assault, but I did plead guilty to the simple
13 assault. Because I was incarcerated for up to a year in state
14 prison and, also, not just at state prison, they had me in PC
15 where I was locked up 23 hours a day and let out for one hour
16 a day, so just to, you know, get it over with, I pled guilty
17 to simple assault.

18 THE COURT: Okay. Anything else you'd like to say?

19 THE DEFENDANT: I'm hoping for --

20 THE COURT: Pardon?

21 THE DEFENDANT: I'm hoping for leniency, your Honor.

22 THE COURT: Okay. Well, it's quite evident from Mr.
23 Garvin's comments just now that, regrettably, we are far from
24 realizing the goals that Congress had in mind when it created
25 the supervision idea in the Sentencing Reform Act of 1984; the

1 goal, of course, being to guide people down into lawful
2 conduct so that there wouldn't be recidivism. And it's quite
3 evident to me that that has not occurred here by a long shot.
4 So we have two convictions, and the defendant is free to think
5 what he may about those convictions, but we take them
6 seriously here. I believe proof beyond a reasonable doubt is
7 still the standard under the due process clause in the Common
8 Pleas Court, as it is here, and so because of these violations
9 described in Paragraphs A and B, as amended by what we've
10 learned since at the hearing today, I find that the defendant
11 is in violation of the term of his supervised release in a
12 very grave form and so I will sanction him by sentencing him
13 to 24 months custody to be followed by another year of
14 supervised release under the conditions imposed in the
15 original judgment.

16 Now, of course, Mr. Garvin, you may appeal this.
17 You know how to take appeals, evidently, and you have 14 days
18 from today to do so.

19 So is there anything else from the Government?

20 MR. LAPPEN: No. Thank you, your Honor.

21 THE COURT: Mr. Wilson?

22 MR. WILSON: I have nothing further, your Honor.

23 THE COURT: Thank you all very much.

24 (Proceedings concluded at 11:29 a.m.)
25

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of the proceedings in the above-entitled
matter.

Kathleen Feldman, CSR, CRR, RPR, CM
Official Court Reporter

Date: _____

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